



**SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977**

NO. 77-1224

**RONALD L. FOSTER,
DELLA M. FOSTER,**

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CLYDE R. MAXWELL
Attorney at Law
567 San Nicolas Drive, Suite 401
Newport Beach, California 92660
(714) 644-5232 (213) 570-8123**

J. GALLAGHER, Printed Briefs

(714) 835-6522

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SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

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Petitioners

vs.

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**PETITION FOR A WRIT OF CERTIORARI
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**TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:**

Petitioners, RONALD L. FOSTER and DELLA M. FOSTER, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above entitled case on December 30, 1977, affirming petitioners' convictions of willful failure to file income tax returns (Forms 1040) for the years 1969 and 1972 in violation of Title 26 U.S.C. §7203.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit before Ely and Hufstedler, Circuit Judges, and Lindberg, District Judge, attached as appendix A., was filed December 30, 1977, No. 76-3733. It is a memorandum decision and is not reported in the published services. The decision affirms the petitioners' convictions for failure to file income tax returns (Forms 1040) for the years 1969 and 1972 in violation of Title 26 U.S.C. §7203. It reverses the §7203 convictions for 1970 and 1971 by reason of the trial court's failure to charge the jury on the Fifth Amendment self incrimination issue required by *Garner v. United States*, (1976) 424 U.S. 648. It reversed the petitioners' convictions of filing with their respective employers false withholding exemption certificates (Forms W-4E) for the years 1972 and 1973 in violation of Title 26 U.S.C. §7205 by reason of the trial court's denial of a pretrial motion to grant an evidentiary hearing on the discriminatory prosecution issue as to the §7205 counts. It sustained the denial of a hearing on the discriminatory prosecution issue as to the §7203 counts under *United States v. Oaks*, 527 F.2d 937 (9th Cir. 1975) and remanded the cause to the District Court for the evidentiary hearing solely as to the §7205 counts.

TIMELINESS OF PETITION

Pursuant to the order staying issuance of mandate by the Court of Appeals filed February 17, 1978

(attached as appendix B) petition for this writ may be filed with this Court by March 2, 1978.

JURISDICTION

Jurisdiction to review the aforestated judgment of the Court of Appeals for the Ninth Circuit by Writ of Certiorari is provided by Title 28 U.S.C. §1254(1).

This petition invokes Rule 19 of the Supreme Court Rules authorizing the granting of this writ in that the decision of the Court of Appeals is in conflict with its own decision in *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972) and the decisions in *United States v. Oaks*, both in the Ninth Circuit, 508 F.2d 1403 (1974) and 527 F.2d 937 (1975), on the issue of prosecutorial discrimination; a serious constitutional question involving the First, Fourth and Fifth Amendments which has not been but should be settled by this Court. Over the years many convictions of tax protesters who raised their constitutional rights, under identical circumstances as these petitioners, have resulted in discriminatory and impermissible prosecution of persons exercising their right of protest under the First Amendment in order to inhibit the exercise of that right. There has been no review by this Court defining the proper prosecutorial limits in this situation.

Furthermore, the Ninth Circuit's decision appears to be in conflict with the criteria set by this Court on the discriminatory prosecution issue and with other circuits.

QUESTIONS PRESENTED

1. Did the Circuit Court err in distinguishing between violations of Title 26 U.S.C. §7203 and Title 26 U.S.C. §7205 in requiring an evidentiary hearing on the discriminatory prosecution issue as to the latter but not as to the former.

2. Did the Circuit Court err in holding that the statistical information is a valid basis for requiring an evidentiary hearing on the §7205 violations as opposed to the §7203 violations.

3. Did the Circuit Court err in failing to apply the criteria of the Supreme Court and other Circuits in requiring a hearing on the discriminatory prosecution issue.

REASONS FOR GRANTING THIS WRIT

Petitioners are members of a Tax Rebellion Group who protest against the requirements of reporting the information required on Forms 1040 by reasons of the Government's monetary and fiscal policies which they believe are in violation of their constitutional rights. Accordingly, petitioners and others of their persuasion file federal tax returns showing their names, addresses and social security numbers but refusing to submit information as to income, exemptions, expenses and tax as an invasion of their rights under the First, Fourth and Fifth Amendments to the Constitution.

In reversing the convictions of failure to file proper returns for 1970 and 1971 the Circuit Court recognized

the application of the Fifth Amendment under *Garner*, *supra* to this form of return. By failure to charge the jury in this respect the convictions were reversed.

The decision points up the importance of the discriminatory prosecution issue in this category of the violation, since the Tax Rebellion Group has national scope with respect to filing Forms 1040 by claiming violation of constitutional rights [(cf. *Porth v. Templar*, 72-1 USTC 9145 (10th Cir. 1971); *United States v. Daly*, 481 F.2d 28 (8th Cir. 1973); *United States v. Jordan*, 508 F.2d 250 (7th Cir. 1975); *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974)].

In *Porth v. Templar*, *supra*, the court found invalid certain conditions of probation prohibiting the taxpayer from circulating materials questioning the constitutionality of the income tax laws and requiring him to abstain from speaking or writing activities which encouraged others to violate such laws. This ruling is vital to the instant petition since petitioners contend that they were invidiously selected for prosecution by reason of their vocal and public actions against the constitutionality of the income tax laws.

The Circuit Court drew arithmetical distinctions on the discriminatory prosecution issue between those prosecuted for violations of §§ 7203 and 7205 of the Internal Revenue Code based upon *United States v. Oaks*, 527 F.2d 937 (9th Cir. 1975).

The court distinguished *Oaks* by holding that the instant record,

“shows that 24 investigations of suspected violations of Section 7205 were made, all of which involved tax protestors. Of those investigated, at least 18 were recommended for prosecution, including these appellants. We cannot say on this record that the appellants’ claim of discriminatory prosecution relating solely to the Section 7205 counts should be rejected without an evidentiary hearing.”

However, the *Oaks* decision, *supra*, shows that during this period 1970 through 1973 (the same period covering the §7205 violations), 160 investigations were made by the Los Angeles District Internal Revenue Service Intelligence Division of suspected §7203 violations. Of these, 48 (30%) involved people identified with the Tax Rebellion Group. Of the 48 recommended for prosecution, 24 were presumably identified with the Tax Rebellion Group and the defendant was one of the 24.

The bifurcation of statistics on the numbers investigated and recommended for prosecution does not warrant distinguishing between the statutes on the basis for granting an evidentiary hearing on the discriminatory prosecution issue. Having granted the hearing on the §7205 violations, the court was required to follow suit as to the §7203 violations.

The §7205 violations are in effect corollaries of the §7203 violations since petitioners in their withholding

exemption certificates deny receipt of taxable income for the previous year requiring withholding. Their protest returns apply to the §7205 charges as well as to the §7203 charges where they place the protest imprimatur on the Forms 1040.

The government has a galaxy of charges to level against tax violators but the issue of discriminatory prosecution should not hinge on the statute allegedly violated but on the individual who is selected for prosecution by reason of exercising his constitutional right.

To distinguish between §§ 7203 and 7205 on the discriminatory prosecution issue in effect violates the decision in *United States v. DeMarco*, 550 F.2d 1224 (9th Cir. 1977). The court dismissed the second indictment by reason of prosecutorial vindictiveness when defendant refused to waive his right to a change in venue. The Ninth Circuit ruled the prosecutor had no right "upping the ante" by bring a new indictment charging an additional offense as a penalty for defendant exercising his rights. "The factual nucleus of both indictments was the same." The court cited *Blackledge v. Perry*, (1974) 417 U.S. 21, 28; *North Carolina v. Pearce*, (1969) 395 U.S. 711.

The analogy to the instant petition is clear. The nucleus of the §7203 and §7205 charges are the same.

LEGAL ARGUMENT

In *United States v. Oaks*, 508 F.2d 1403 (9th Cir.

1974) the court ruled a tax protestor, a member of the Tax Rebellion Group, was entitled to an evidentiary hearing on the issue of discriminatory prosecution as follows:

"In *United States v. Steele*, 461 F.2d 1148 (CA 9, 1972) we held that a policy of selective prosecution which purposefully discriminates against persons choosing to exercise their first amendment rights is impermissible."

The Fourteenth Amendment prohibits any state from taking action which would deny to any person within its jurisdiction the equal protection of the laws. This admonition is applicable to the Federal government through the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Washington v. United States*, 401 F.2d 915 (CA D.C. 1968).

This Court ruled in *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886) that the administration of laws "with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances" constitutes a denial of equal protection.

A defendant cannot be convicted if he proves unconstitutional discrimination in the administration of a penal statute. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

The petitioners have complied with the rule in *United States v. Berrios*, 501 F.2d 1207 (2nd Cir. 1974) on the issue of discriminatory prosecution since he has

prima facie established: "(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution; and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights."

United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973) holds on the discriminatory prosecution question:

"These cases teach that although the government is permitted 'the conscious exercise of some selectivity' in the enforcement of its criminal laws, **Oyler v. Boles**, 368 U.S. 448, 456, any 'systematic discrimination' in enforcement, **Robinson**, supra, 311 F. Supp. at 1065, 'or unjust and illegal discrimination between persons in similar circumstances, **Yick Wo**, supra, 118 U.S. at 374, violates the equal protection clause and renders the prosecution invalid.'"

In **United States v. Falk**, 479 F.2d 616 (7th Cir. 1973, rehearing in banc) the court reversed the conviction of a vocal Vietnam war protester for failure to possess a draft card and submit to induction. On the defendant's showing that over 25,000 individuals were not prosecuted for similar charges, the court ordered an evidentiary hearing. The court held that defendant alleged "intentional purposeful discrimination and presented facts sufficient to raise a reasonable doubt about the prosecutor's purpose"

Significantly, the court ruled: "The particular circumstances of this case which we believe compelled the government to accept the burden of proving non-discriminatory enforcement of the law are several." The court pointed to defendant as a vocal dissenter against the Vietnam War.

It is submitted that the Ninth Circuit's decision as to which certiorari is sought does not meet the criteria of the Supreme Court and other circuits on the issue of discriminatory prosecution, and therefore that the decision violates due process of law as to these defendants.

CONCLUSION

For the reasons stated, petitioners respectfully submit that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

CLYDE R. MAXWELL
FRED G. CUNARD

BY: CLYDE R. MAXWELL

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 76-3733
MEMORANDUM

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

**RONALD FOSTER and
DELLA FOSTER,**

Defendants-Appellants

**Appeal from the United States District Court
for the Central District of California**

**Before: ELY and HUFSTEDLER, Circuit Judges,
and LINDBERG,* District Judge.**

**Ronald and Della Foster, husband and wife, appeal
from their convictions on four counts each for willful
failure to file federal income tax returns for the years**

* Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

1969 through 1972, in violation of 26 U.S.C. § 7203, and two counts each for willfully submitting false or fraudulent withholding certificates in 1972 and 1973, in violation of 26 U.S.C. § 7205. Each appellant received a suspended sentence of one year imprisonment for each of the counts and a \$10,500 fine, and was placed on probation for a period of three years. The sentences imposed under the two Section 7205 counts and the Section 7203 counts for 1969 and 1972 were concurrent.

None of the issues raised on appeal has sufficient merit to justify discussion, except the obliquely-raised point that the court did not instruct the jury upon the impact of *Garner v. United States* (1976) 424 U.S. 648, and the claim that the appellants were entitled to an evidentiary hearing on the discriminatory prosecution issue.

The appellants are members of the Tax Rebellion Group. Ronald earned \$9,169.63 in 1969, \$9,267.17 in 1970, \$11,353.74 in 1971, and \$11,842.87 in 1972; Della earned \$7,100.62 in 1969, \$7,573.46 in 1970, \$7,037.82 in 1971, and \$7,695.51 in 1972. For the years 1969 and 1972, they filed no federal income tax returns; for the years 1970 (Footnote 1) and 1971, they filed unsigned Forms 1040 with only their names, their addresses, and an assertion that Form 1040 violated their Fifth

Footnote 1: The Government's brief erroneously stated the year to be 1969. An examination of the exhibits reveals that the Fosters used a printed 1969 form for 1970.

Amendment rights. These forms were returned by the Internal Revenue Service with instructions on how to make valid returns. No subsequent returns were made by the appellants. In 1972 and 1973, Ronald and Della filed Form W4-E tax withholding certificates with their separate employers, certifying that they incurred no federal income tax liabilities for the immediate preceding year by virtue of certain provisions of the United States Constitution.

Following a jury trial, the appellants were convicted on all of the counts charged.

I

Contrary to appellant's contention, Garner does not prevent prosecution for violation of Section 7203 when taxpayers assert the Fifth Amendment to avoid responding to questions on their tax returns. All Garner does is to permit taxpayers to assert a defense to a Section 7203 charge on the ground that they made a good faith claim of Fifth Amendment privilege.

Garner is irrelevant to the appellants' prosecution for the years 1969 and 1972, because they failed to file any returns for those years. No Fifth Amendment claim can be asserted in respect of returns that appellants did not file. (*United States v. Sullivan* (1927) 274 U.S. 259; see *Garner v. United States*, *supra*, at 651, n.3.)

Appellants did claim the Fifth Amendment privilege on their 1970 and 1971 returns. The appellants sought a jury instruction based upon the Garner case,

which the court rejected in favor of a proposed instruction that the court drew from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 35.31, at 158 (1977). (Our court approved that instruction in *Cooley v. United States* (9th Cir. 1974) 501 F.2d 1249, 1253.) The problem is that the district court did not give the instruction to the jury. As nearly as we can ascertain from the record, no one noticed the omission when the jury was instructed. The failure to instruct upon the appellants' defense based on Garner and Cooley was plain error, which survives on appeal despite the absence of an appropriate exception in the district court. Accordingly, appellants' convictions on the Section 7203 counts for the years 1970 and 1971 must be reversed.

II

The district court denied appellants' pretrial motions for an evidentiary hearing on the issue of discriminatory prosecution, in reliance on *United States v. Oaks* (9th Cir. 1975) 527 F.2d 937. Upon a comparison of the materials presented in the Oaks case and the internal memoranda of the Internal Revenue Service lodged in camera with the district court, we are convinced that Oaks adequately disposes of the Section 7203 counts. The statistics considered in Oaks are the same as those presented in this case. However, the record does not support denial of the claim of

discriminatory prosecution in respect of Section 7205 counts, without an evidentiary hearing. Here, unlike **Oaks**, the record shows that 24 investigations of suspected violations of Section 7205 were made, all of which involved tax protestors. Of those investigated, at least 18 were recommended for prosecution, including these appellants. We cannot say on this record that the appellants' claim of discriminatory prosecution relating solely to the Section 7205 counts should be rejected without an evidentiary hearing.

The convictions on the Section 7203 counts for the years 1970 and 1971 are reversed; the convictions on the Section 7203 counts for the years 1969 and 1972 are affirmed. Unless the United States dismisses the Section 7203 counts for the years 1970 and 1971, the appellants are entitled to a new trial on those counts. The cause is remanded to the district court for an evidentiary hearing on the appellants' claims of discriminatory prosecution solely in connection with the counts based upon claimed violations of Section 7205. Pending determination of the evidentiary hearing on the Section 7205 counts, appellants' convictions on the Section 7205 counts are vacated.

APPENDIX B**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Filed

Feb 17 1978

U.S. Court of Appeals Clerk

No. 76-3733

DC#CR75-539 Stephens

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RONALD L. FOSTER,
DELLA M. FOSTER,

Defendants-Appellants

ORDER STAYING ISSUANCE OF MANDATE

Upon application of **CLYDE R. MAXWELL, ESQUIRE**, counsel for the Defendants-Appellants, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States

of a petition for writ of certiorari to be made by the Defendants-Appellants herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before March 2, 1978.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

SHIRLEY M. HUFSTEDLER
United States Circuit Judge

s/Denied

Walter Ely

Shirley Hufstedler

DATED: Los Angeles

February 10, 1978

CLYDE R. MAXWELL

Suite 401

Newport Beach, CA 92660

(714) 644-5232 (213)570-8123

Form No. 14

APPENDIX C

INTERNAL REVENUE CODE

Section 7203 Wilful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Aug. 16, 1954, c. 736, 68A Stat. 851.

INTERNAL REVENUE CODE

Section 7205 Fraudulent withholding exemption certificate or failure to supply information.

Any individual required to supply information to his employer under section 3402 who willfully supplies

false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than \$500, or imprisoned not more than 1 year, or both. Aug. 16, 1954, c. 736, 68A Stat. 852; Mar. 15, 1966 Pub.L. 89-368, Title I, Sec. 101(e)(5), 80 Stat. 62.

PROOF OF SERVICE

STATE OF CALIFORNIA)

ss

County of Riverside)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1509 N. Main, Santa Ana, California.

On March 1, 1978, I served the within PETITION FOR A WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of two sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Andrea S. Ordin	Wade H. McCree, Jr.
United States Attorney	U. S. Solicitor General
312 N. Spring St., Room 1200	Department of Justice
Los Angeles, CA 90012	Washington, D.C. 20530

I CERTIFY under penalty of perjury that the foregoing is true and correct.

EXECUTED on March 1, 1978, at Santa Ana, California.

JACK GALLAGHER

